85-1074

Supreme Court, U.S.
FILED
DEC 18 1985
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF FLORIDA,

Petitioner,

vs.

JERRY HALIBURTON,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITION FOR WRIT OF CERTIORARI

AND APPENDIX

JIM SMITH
Attorney General

PENNY H. BRILL
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

QUESTIONS PRESENTED FOR REVIEW

I

WHETHER THE FIFTH AMENDMENT'S SELF-INCRIMINATION CLAUSE AND MIRANDA v. ARIZONA, 384 U.S. 436 (1966) REQUIRE SUPPRESSION OF A DEFENDANT'S STATEMENT, MADE AFTER PROPER MIRANDA WARNINGS AND REPEATED VALID WAIVERS OF RIGHTS, SOLELY BECAUSE THE DEFENDANT WAS NOT INFORMED THAT AN ATTORNEY, UNREQUESTED BY THE DEFENDANT AND RETAINED BY A THIRD PARTY, WAS AT THE POLICE STATION SEEKING TO SPEAK TO HIM?

II

WHETHER THE FLORIDA SUPREME COURT'S FAILURE TO CONSIDER THAT THE ALLEGED CONSTITUTIONAL ERROR IN THE ADMISSION OF A DEFENDANT'S STATEMENTS WAS HARMLESS BEYOND A REASONABLE DOUBT IN LIGHT OF OTHER EVIDENCE, INCLUDING THE TESTIMONY OF TWO OTHER WITNESSES TO WHOM THE DEFENDANT HAD CONFESSED IN DETAIL TO COMMITTING THE MURDER, CONFLICTS WITH THIS COURT'S DECISION IN MILTON v. WAIWNRIGHT, 407 U.S. 371 (1972)?

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PREFACE	1
OPINIONS BELOW	1
GROUNDS UPON WHICH JURISDICTION IS INVOKED	2
FEDERAL CONSTITUTIONAL PROVISION INVOLVED	3
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	13
CONCLUSION	33

TABLE OF AUTHORITIES

	Page
Blanks v. State, 254 Ga. 420, 330 S.E.2d 575 (1985)	18
Burbine v. Moran, 753 F.2d 178 (1st. Cir. 1985)	17,21
Commonweath v. Hilliard, 471 Pa. 318, 370 A.2d 322 (1977)	20
Commonweath v. Sherman, 389 Mass. 566, 450 N.E.2d 566 (1983)	20
Commonweath v. Yates, 467 Pa. 362, 357 A.2d 134 (1976)	19
Culombe v. Connecticut, 367 U.S. 568 (1961)	25
Dunn v. State, 696 S.W.2d 561 (Tex Cr. App. 1985)	19
Escobedo v. Illinois, 378 U.S. 478 (1964)	3
Fare v. Michael C.,422 U.S. 707 (1970)	14
Fuentes v. Moran, 733 F.2d 176 (1st Cir. 1984)	21
Hance v. Zant, 696 F.2d 940 (11th Cir. 1983)	22

TABLE OF AUTHORITIES (CONT.)

	Page
Johnson v. Zerbst, 304 U.S. 458 (1938)	14
Lewis v. State, 695 P.2d 528 (Okl. 1984)	20
Lodowski v. State, 302 Md. 691, A.2d 1228 (1985)	20
Maryland v. Lodowski, Case No. 85-23, 37 Cr.L. 4115	20
McNamara v. State, 357 So.2d 410 (Fla. 1978)	8
Milton v. Wainwright, 407 U.S. 371 (1972)	28,29 30,32
Miranda v. Arizona, 384 U.S. 436 (1966)	11,13, 14,15, 22,25 27
Moran v. Burbine, ___ U.S. ___, 105 S.Ct. 2319, 85 L.Ed.2d 838 (1985)	18
Palmes v. Wainwright, 725 F.2d 1511 (11th Cir. 1984)	22
People v. Gott, 117 Cal. App. 3d 125, 173 Cal. Rptr. 469 (1981)	19

TABLE OF AUTHORITIES (CONT.)

	Page
People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976)	21
People v. Smith, 93 Ill.2d 179, 66 Ill. Dec. 412, 442 N.E.2d 1325 (1982)	20
Schneckloth v. Bustemonte, 412 U.S. 218 (1973)	26
State v. Beck, 687 S.W.2d 155 (1985)	18
State v. Blanford, 306 N.W. 2d 93 (Iowa 1981)	18
State v. Burbine, 451 A.2d 22,35 (R.I. 1982)	11,16, 17
State v. Chase, 55 Ohio St.2d 237, 378 N.E.2d 1064 (1978)	18
State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979)	20
State v. Jones, 19 Wash. App. 858, 578 P.2d 71 (1978)	20
State v. Matthews , 408 So.2d 1274 (La. 1982)	20-21
United States v. Gouveia, ___ U.S. ___, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984)	3

TABLE OF AUTHORITIES (CONT.)

	Page
Weber v. State, 457 A.2d 674 (Del. 1983)	20
Wheeler v. State, 765 P.2d 861 (Wyo. 1985)	18
Yates v. State, 467 So.2d 884 (Miss. 1984)	20
STATUTES	
28 U.S.C §1257(3)	2
UNITED STATES CONSTITUTION	
Fifth Amendment to the United States Constitution	3,13, 15,16, 19,21, 22,24, 25,27, 29
Sixth Amendment to the United States Constitution	3,22 29
OTHER AUTHORITIES	
81 Cong. Rec. 2814-2815 (1937)	28
Kamisar, Brewer v. Williams, Massiah, and Miranda: What is Interrogation? What Does it Matter? 67 Geo. L.J. 1, 95 (1978)	24

PREFACE

The Petitioner, the State of Florida, was the Appellee in the Supreme Court of Florida. The Respondent, Jerry Hailburton, was the Appellant in the Supreme Court of Florida. In this brief, the parties will be referred to as they appear before this Court.

The following reference is made in this brief:

(A) For the portions of the record below sufficient to show jurisdiction in this Court, which are contained in the Petitioner's Appendix and consists of pages A1- A28.

OPINIONS BELOW

The decision of the Supreme Court of the State of Florida was rendered on August 30, 1985. It is not yet reported, but is reproduced in the state's Appendix at (A 1 - A 11). Rehearing was denied on October 24,

1985. (A. 12- A. 13). The order of the state trial court denying the defendant's motion to suppress, rendered on November 8, 1982, is unreported, but reproduced at (A. 14 - A. 15).

GROUNDS UPON WHICH JURISDICTION IS INVOKED

The opinion and judgment of the Supreme Court of Florida was rendered on August 30, 1985. The Petitioner timely petitioned for rehearing. The motion for rehearing was denied on October 24, 1985. The jurisdiction of this Honorable Court is invoked pursuant to the specific provisions of Title 28 U.S.C. § 1257(3).

FEDERAL CONSTITUTIONAL PROVISION INVOLVED[1/]

The Fifth Amendment to the United States Constitution provides as follows:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private

---

1/ The Sixth Amendment right to counsel is not involved in the present case where the police questioning occurred pre-indictment, see United States v. Gouveia, ___ U.S. ___, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984), and Respondent never requested counsel. Compare Escobedo v. Illinois, 378 U.S. 478 (1964).

property be taken for public use, without just compensation.

STATEMENT OF THE CASE

The Respondent, Jerry Haliburton, was indicted for the crimes of burglary and first degree murder. On August 9, 1981, between 5:00 and 5:30 p.m., the body of Don Bohanon was found in his bed in his apartment in West Palm Beach, Florida. Medical evidence indicated that death, cause by multiple stab wounds had occurred between 12:30 a.m. and 12:30 p.m. that day. Police suspected a burglary because newly replaced jalousies had been removed from the apartment door and several hundred dollars were missing. Fingerprints taken from the jalousies matched Respondent's who lived nearby in downtown West Palm Beach.

On August 13, 1981, at about 6:30 a.m., Respondent, who was an experienced defendant in the criminal justice sytem, was taken to the West Palm Beach police station. He was advised of his rights, indicated that he understood all of the rights, stating that there was no reason not to speak to the officers, and when asked if he wanted an attorney replied "No, not right now." Respondent never requested an attorney thereafter. At approximately 7:00 a.m., the officers began interrogating the Respondent until 9:30 a.m., and then again at 10:00 a.m. for another ten minutes. At that point Respondent agreed to undergo a polygraph examination.

At approximately 2:00 p.m., the polygraph examiner arrived. Respon-

dent was again advised of his rights. Respondent never indicated that he wanted a lawyer or that he did not want to answer any questions. Respondent then submitted to a polygraph examination. Meanwhile, between 2:00 and 3:00 p.m., Respondent's sister retained a lawyer, Thomas Burford, to represent the Respondent. Burford called the police department at either 2:45 or 3:47 p.m.,[2/] and informed the police that he had been retained by Respondent's sister and that he wanted no further questioning of the Respondent. Burford was told that the police were near the end of the polygraph examination and that it could not be interrupted. Burford stated that he under-

---

[2/] There is a conflict in testimony as to when that call was received.

stood and did not insist that the polygraph be interrupted. The polygraph was completed at approximately 3:29 p.m. The polygraph examiner told Respondent that his responses indicated deception. Thereafter, Respondent changed his story, stating that he had in fact broken into Bohannon's apartment, saw Bohannon bleeding profusely in his bed, and then fled. A post-test release agreement was executed at 3:48 p.m.

At that point, one of the officers testified that he told Respondent that one of his sisters had called a lawyer for him who was suppose to come to the police station. (A. 16, 18). Respondent did not say he wanted to or did not want to talk to the lawyer, "he just sort of slunked his shoul-

ders." (A. 16-17).[3] After further conversation to see if the Respondent wanted to continue talking, the taped statement resumed at 3:56 p.m. and continued until 4:20 p.m.

At approximately 3:58 p.m., attorney Burford arrived at the police station and asked to speak to the Respondent. However, he was refused

---

[3] The officer who testified to telling Respondent about the lawyer was contradicted by two other officers, as well as his own pretrial deposition. (A. 20-21). The officer explained his contrary statements at the hearing. The fact that the officer's testimony was contradicted by other state witnesses is irrelevant because where as in in the instant case, there is no specific factual findings by the trial court on the motion to suppress, Florida requires the reviewing court to interpret the evidence and reasonable inferences and deductions derived therefrom in a manner most favorable to sustaining the trial court's ruling. McNamara v. State, 357 So.2d 410, 412 (Fla. 1978).

access to the Respondent. By 4:18 p.m., Burford had a telephone court order requiring that the police give him access to the Respondent. After a second phone call from the judge, the police chief ordered that the interrogation cease, and Burford was able to see the Respondent.

Without making specific findings of fact, the trial court denied Respondent's motion to suppress. (A.14-15). The recorded statement from 3:56 p.m. until 4:20 p.m., in which the Respondent admitted breaking in and seeing the body, but denying the murder, was played for the jury. In addition, a tape recording of Respondent's statements at 7:00 a.m. and 10:00 a.m., where Respondent stated that he had been in Bohannon's

apartment only one time, to smoke some marijuana joints in the bedroom, was also played for the jury. Those statements were contradicted at trial by witnesses who testified that Bohannon was somewhat of a racist who did not socialize with blacks. Also introduced at trial was the testimony of Respondent's brother, Freddie Haliburton, and Freddie's girlfriend, Sharon Williams. Freddie Haliburton testified that in December of 1981, Respondent confessed that he had killed the victim, and described how and why he did it. Sharon Williams testified that during an attack on her by Respondent in March of 1982, Respondent told her that he had committed the murder. Both she and Freddie Haliburton subsequently went to the

police station and gave separate statements.

Respondent was convicted of burglary and first degree murder and sentenced to death. Respondent appealed his convictions and sentence to the Supreme Court of Florida. Respondent alleged in his appeal that his waiver of counsel was not knowing and voluntary where he was not told that his family had provided an attorney for him. The Petitioner responded that this Court's decision in Miranda v. Arizona, 384 U.S. 436 (1966) did not mandate such a result. The Supreme Court of Florida, citing the dissenting opinion of Chief Justice Bevilacqua of the Rhode Island Supreme Court in State v. Burbine, 451 A.2d 22, 35 (R.I. 1982) (Bevilacqua, C. J., dissenting), held that the

failure of the police to inform the Respondent that an attorney retained by his sister on his behalf was in the station house requesting to speak with him, violated Respondent's otherwise valid waiver of his right to counsel. (A. 6-7, 9). The court reversed the convictions finding the failure to suppress the recorded statement to be reversible error. (A. 10). The Petitioner filed for rehearing, which the Florida Supreme Court denied. The Florida Supreme Court did grant a temporary stay of the mandate pending review in this Court, which this Court extended by order on November 14, 1985. The instant Petition for Writ of Certiorari follows.

REASONS FOR GRANTING THE WRIT

This Court, in its opinion in Miranda v. Arizona, 384 U.S. 436 (1966), for the first time provided a set of police guidelines to balance the societal need for police interrogation with an accused's right under the Fifth Amendment to be protected against undue coercive pressures which compel him to be a witness against himself. The rules provide that the police must advise or warn a suspect of a number of "personal" rights, including the right to remain silent, and the right to the presence of an attorney, either retained or appointed. 384 U.S. at 467-470.

As a corollary to these advice of rights, this Court recognized that a

suspect, after having been properly informed of his rights could waive any or all of those rights, but such waiver must have been made "voluntarily, knowingly and intelligently." 384 U.S. at 479. The making of that determination, depends on all of the facts of each particular case, Fare v. Michael C., 422 U.S. 707, 724-725 (1970), and the courts must review the totality of the circumstances surrounding the waiver, including the background, experience, and conduct of the accused. Johnson v. Zerbst, 304 U.S. 458, 464 (1938). Although the requirements of Miranda and the determination of waiver may seem simple on their face, the courts in struggling with the area of police interrogation, particularily where

an unrequested attorney, retained by a third party enters into the proceedings, have found the opposite to be the case. For this reason this Court should accept jurisdiction.

A. WHETHER THE FIFTH AMENDMENT'S SELF-INCRIMINATION CLAUSE AND MIRANDA V. ARIZONA, REQUIRE SUPPRESSION OF A DEFENDANT'S STATEMENT, MADE AFTER PROPER MIRANDA WARNINGS AND REPEATED VALID WAIVERS OF RIGHTS, SOLELY BECAUSE THE DEFENDANT WAS NOT INFORMED THAT AN ATTORNEY, UNREQUESTED BY THE DEFENDANT AND RETAINED BY A THIRD PARTY, WAS AT THE POLICE STATION SEEKING TO SPEAK TO HIM.

The Supreme Court of Florida, in the present case, has construed the Fifth Amendment's Self Incrimination Clause and this Court's decision in Miranda v. Arizona, supra, to require the police to not only inform a suspect of his right to counsel, but if a

third party has retained counsel for the suspect without the suspect's request, to also inform the suspect that said lawyer is in the station house requesting to speak with the suspect. The failure to convey such information, by itself, without reviewing the other circumstances, vitiated all prior valid waivers by the suspect of his rights. (A. 9). This construction of the Fifth Amendment conflicts with the construction given the Self-Incrimination Clause under similar circumstances by various other state courts of last resort.

In State v. Burbine, 451 A.2d 22 (R.I. 1982), the majority of the Supreme Court of Rhode Island rejected the requirement that the police officers inform the accused

that counsel retained by his sister had called and inquired about him. Instead the Rhode Island Court looked at the totality of the circumstnaces to determine whether that additional information was necessary for the accused to make an informed decision as to waiver. 451 A.2d at 29-30. The Florida Supreme Court's decision in the present case conflicts with State v. Burbine, because the Florida court adopted the holding of the dissenting opinion in the Rhode Island case. (A. 6-7). The First Circuit Court of Appeals also subsequently rejected the majority opinion of Burbine, and ordered the district court to grant Burbine's petition for writ of habeas corpus. Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985).

This Court has since granted jurisdiction to review Rhode Island's petition for writ of certiorari. Moran v. Burbine, ___ U.S. ____, 105 S.Ct. 2319, 85 L.Ed.2d 838 (1985). Other state courts of last resort which have held that the police are not obligated to tell a defendant of an unrequested lawyer's call or attempts to contact him include Georgia, Blanks v. State, 254 Ga. 420, 330 S.E.2d 575, 578-599 (1985); Iowa, State v. Blanford, 306 N.W. 2d 93, 96-97 (Iowa 1981); Missouri, State v. Beck, 687 S.W.2d 155, 158-159(1985); Ohio, State v. Chase, 55 Ohio, St.2d. 237, 378 N.E.2d 1064, 1069-1070 (1978); and Wyoming, Wheeler v. State, 765 P.2d 861, 862-863 (Wyo. 1985).[4/]

[4/] A California appellate court

Petitioner recognizes the Supreme Court of Florida's opinion in the instant case is consistent with other states which have held that the Fifth Amendment requires that law enforcement officers inform an accused of a requested or unrequested attorney's efforts to reach him. The failure to do so forcloses the officer's reliance on the statements as evidence against him. See, e.g.,

---

(Footnote 4 continued), decision likewise rejected this requirement. People v. Gott, 117 Cal. App. 3d 125, 173 Cal. Rptr. 469, 471-472 (1981). Pennsylvania also initially followed these line of cases. See Commonwealth v. Yates, 467 Pa. 362, 357 A.2d 134, 135-136 (1976). A recent Texas appellate court decision, similarly refused to adopt a per se requirement of notification to the accused, looking instead to the totality of the circumstances, to find that in the specific case the absence of such notification made the waiver involuntary. Dunn v. State, 696 S.W. 2d 561 (Tex Cr. App. 1985).

Weber v. State, 457 A.2d 674 (Del. 1983); People v. Smith, 93 Ill.2d 179, 66 Ill. Dec. 412, 442 N.E.2d 1325 (1982); Lodowski v. State, 302 Md. 691, 490 A.2d 1228 (1985);[5] Commonwealth v. Sherman, 389 Mass. 566, 450 N.E.2d 566 (1983); Yates v. State, 467 So.2d 884 (Miss. 1984); Lewis v. State, 695 P.2d 528 (Okl. 1984); State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979); Commonwealth v. Hilliard, 471 Pa. 318, 370 A.2d 322 (1977); State v. Jones, 19 Wash. App. 858, 578 P.2d 71 (1978).[6]

---

[5] The State of Maryland has recently petitioned for certiorari to this Court on this issue. Maryland v. Lodowski, Case No. 85-23, 37 CrL 4115.

[6] Other states have found that the requirement that an accused be informed of an unrequested counsel's efforts to reach him to be grounded in their state constituions. See, e.g.,

The federal courts of appeal have not specifically addressed this issue. As stated supra, the First Circuit in Burbine v. Moran, supra, held that the defendant's Fifth Amendment rights were violated by the police officers' failure to tell the defendant that an attorney acting for him had called to offer his services. However, in Fuentes v. Moran, 733 F.2d 176, 181 (1st Cir. 1984), the First Circuit rejected a similar claim, finding that where the defendant knew of his right to counsel and counsel's availability, the failure to notify the defendant of counsel's inquiry on his behalf did not make the waiver unknowing.

(Footnote 6 continued), State v. Matthews 408 So.2d 1274 (La. 1982); People v. Hobson, 39 N.Y.2d 479, 348 N.E.2d 894, 384 N.Y.S.2d 419 (1976).

The Eleventh Circuit in two opinions touched peripherally on the issue. In Hance v. Zant, 696 F.2d 940, 947 (11th Cir. 1983), the Court held that neither the defendants Fifth or Sixth Amendment rights were not violated by not informing him that an attorney, not yet retained by the defendant, was attempting to locate and advise him of his rights. Similarly in Palmes v. Wainwright, 725 F.2d 1511, 1520 n. 9 (11th Cir. 1984), the court rejected the requirement that counsel need be present to advise the defendant to not speak with police.

The decision of the Supreme Court of Florida in the present case has engrafted onto the Fifth Amendment and has expanded this Court's opinion in Miranda v. Arizona, supra,

to include a requirement that no matter what the other circumstances are, that in order for a waiver of rights to be voluntarily, knowingly and intelligently made, the police officers must advise an accused that counsel, unrequested by him, and retained by a third party has attempted to contact him. The failure to do so will vitiate a valid waiver, regardless of how experienced a defendent is, and regardless of how many times a defendant has been told that he does not have to talk, and that he has the right to have an attorney present. Such holding necessarily implies that the Miranda warnings mean absolutely nothing and that a defendant is unable to waive those rights without the advice of counsel. Under the Supreme

Court of Florida's opinion, the Fifth Amendment rights do not belong personally to the defendant, but rather belong to the attorney, as the focus shifts from the defendant's rights to an alleged right of the attorney to intervene in order to advise the defendant to stop talking.

"Whatever, its symbolic value, a rule that turns on how soon a defense lawyer appears at the police station or how quickly he 'spring(s) to the telephone' hardly seems a rational way of reconciling the interests of the accused with those of society." Kamisar, Brewer v. Williams, Massiah, and Miranda: What is Interrogation? When Does it Matter? 67 Geo. L.J. 1, 95 (1978). The desirability of legal assistance during interrogation

should not turn upon the rapidity with which third parties have acted to retain an attorney to enter the proceedings. If Miranda warnings are insufficient to protect Fifth Amendment rights, this insufficiency should not be addressed by a rule which would protect only those with money and connections "to bring a lawyer swiftly into the fray" and which "would seem to favor the 'professional criminal' most of all." Id. at 95-96.

Society has a legitimate interest in the questioning of suspects as part of law enforcement. Culombe v. Connecticut, 367 U.S. 568, 578 (1961). Government has the responsibility to protect the security of its citizens, i.e., victims, as

well as those who may be accused of crime. In striking a balance between these interests this Court has never adopted any per se rules or isolated any one circumstance. Cf. Schneckloth v. Bustemonte, 412 U.S. 218, 248-249 (1973) (a defendant's unawareness of his right to refuse a warrantless search is only one circumstance to be considered in determining the voluntariness of the consent). A rule such as the one espoused by the Supreme Court of Florida, in effect allows third parties to unilaterally invoke the constitutional rights of a defendant. It ignores the other circumstances surrounding the waiver, such as in the instant case, the Respondent's experience with the criminal justice system,

his knowledge that his sister had contacted an attorney for him, the officers having repeatedly advised him of his rights and Respondent's repeated waivers of those rights.

The Supreme Court of Florida's abrogation of the Fifth Amendment and Miranda v. Arizona, supra, as well as the express and obvious diversity and conflict among the states as to the effect an unrequested counsel's interjection into the proceedings affects a previous valid waiver of rights, warrants jurisdiction under this Court's rules and substantive law. The express purpose of the framers of the Constitution in establishing this Court was "to secure the national rights [and] uniformity of Judgments." Letter from Chief

Justice Hughes, March 23, 1937, quoting John Rutledge of South Carolina, reprinted in 81 Cong. Rec. 2814-2815 (1937). That supreme purpose of this Court would be properly met by the exercise of jurisdiction herein.

B. WHETHER THE FLORIDA SUPREME COURT'S FAILURE TO CONSIDER THAT THE ALLEGED CONSTITUTIONAL ERROR IN THE ADMISSION OF A DEFENDANT'S STATEMENT'S WAS HARMLESS BEYOND A REASONABLE DOUBT IN LIGHT OF OTHER EVIDENCE, INCLUDING THE TESTIMONY OF TWO OTHER WITNESSES TO WHOM THE DEFENDANT HAD CONFESSED IN DETAIL TO COMMITTING THE MURDER, CONFLICTS WITH THIS COURT'S DECISION IN MILTON V. WAINWRIGHT 407 U.S. 371 (1972).

The Supreme Court of Florida in its opinion simply found that

the failure to suppress Respondent's recorded statement given from 3:56 until 4:20 p.m., while the attorney was attempting to see him, was reversible error. (A. 10). In so doing, the state court failed to review whether the statement's admission was harmless beyond a reasonable doubt, thus confiicting with this Court's opinion in Milton v. Wainwright, 407 U.S. 371 (1972).

In Milton v. Wainwright, supra, this Court held that before reversing a conviction for the admission of a defendant's statement procurred in violation of the defendant's Fifth or Sixth Amendment rights, the court must review the record to determine if any error in its

admission was harmless beyond a reasonable doubt. 407 U.S. at 372-373. In Milton, this Court held the alleged error to be harmless where, the jury, in addition to hearing the challenged testimony, was presented evidence of three other valid full confessions that were made by the defendant.

In the instant case, the Respondent did not admit to committing the murder, but he did admit to breaking into the victim's house and seeing the body. Even without that admission, the state was able to prove that the Respondent had broken into the victim's house. His fingerprint was found on a newly replaced jalousy at the point of entry. In

his initial statement to the police, which was not the subject of Supreme Court of Florida's order of suppression, Respondent attempted to explain his fingerprint by stating that he had been in the victim's apartment only one time, to smoke some marijuana. However, that statement was contradicted at trial by witnesses who testified that the victim was somewhat of a racist who did not socialize with blacks. Even more important the state properly introduced the testimony of Respondent's brother and his brother's girlfriend. Both testified that Respondent had admitted in detail to both of them, on separate occasions, that he had committed the murder.

Thus, it is clear that not only did the Supreme Court of Florida fail to consider, but also failed to properly apply, the harmless beyond a reasonable doubt standard in the present case. This failure is in conflict with this Court's opinion in Milton v. Wainwright, supra, and the Petitioner would therefore urge this Court to grant certiorari on this issue and reaffirm the principle that constitutional error is subject to the harmless beyond a reasonable doubt standard as espoused in this Court's prior decisions and which has been severely abrogated by the opinion of the Supreme Court of Florida.

CONCLUSION

Petitioner has sought to present to this Court a substantial basis upon which to conclude that this area of law is deserving of being addressed by the United States Supreme Court. There is a solid jurisdictional basis predicated upon conflicts between the opinion under review and the opinions rendered by other state courts of last resort and federal courts of appeal. Further, there are substantial questions of federal law that have serious nationwide ramifications, which is shown by this Court's acceptance of jurisdiction in a case specifically relied on by the state court in the present case. There are no collateral

issues contained in the instant factual pattern which could have effect of diverting this Court's attention away from the issues herein presented. On the basis of the above, Petitioner submits that the instant Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JIM SMITH
Attorney General

PENNY H. BRILL
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Petitioner

APPENDIX

INDEX TO APPENDIX

	Page
Opinion of the Supreme Court of Florida, under review herein, filed August 30, 1985	1-11
Order of the Supreme Court of Florida, entered on October 24, 1985, denying Petitioner's motion for rehearing	12-13
Order of the Circuit Court of the Fifteenth Judicial Circuit of Florida, in and for Palm Beach County, denying Respondent's motion to suppress	14-15
Excerpts from the Evidentiary Hearing on Respondent's Motion to Suppress, Testimony of Sergeant Calvin Bryant	16-28

SUPREME COURT OF FLORIDA

No. 64,510

JERRY HALIBURTON, Appellant,

vs.

STATE OF FLORIDA, Appellee.

[August 30, 1985]

SHAW, J.

This is a direct appeal from convictions for burglary and first-degree murder and a sentence of death. We have jurisdiction. Art. V, § 3(b)(1), Fla. Const. We reverse.

The body of Don Bohannon was found in his bed on the afternoon of August 9, 1981. Medical evidence indicated that death, caused by multiple stab wounds, had occurred sometime after 12:30 a.m. that morning. The perpetrator had gained entry to the victim's apartment by removing

glass panes from a jalousie door. Fingerprint evidence led the police to appellant, who lived nearby in downtown West Palm Beach.

Appellant was taken to the police station on August 13, 1981, at about 6:30 a.m., advised of his rights, and questioned until 9:30 a.m., and then again at 10 a.m. for another ten minutes. He submitted to a polygraph examination 2:05 p.m. Meanwhile appellant's sister retained an attorney to represent him. The attorney called the police near the end of the polygraph examination and requested that the questioning stop. The attorney arrived at the police station a few minutes before 4 p.m. and asked to speak with appellant, but was not allowed to do so. Appel-

lant gave a recorded statement from 3:56 until 4:20 p.m. that was played to the jury. By 4:18 p.m. the attorney had a telephone court order requiring that the police give him access to appellant. After the judge's second phone call, the police chief ordered that the interrogation cease, and the attorney was able to see appellant.*

Appellant did not admit to committing the murder in the recorded statement that concluded at 4:20 p.m., but he did admit breaking in and seeing the body. He was arrested

---

*On a subsequent occasion, the same police department did not so readily acquiesce to the same judge's order. Jamason v. State, 455 So.2d 380 (Fla. 1984), cert. denied, and appeal denied, 105 S. Ct. 768 (1985)

for first-degree murder and burglary. The grand jury did not return an indictment for the murder, and he was released on bond. The right to speedy trial was waived on December 17, 1981.

Subsequently appellant's brother and his brother's girlfriend went to the police, stating that appellant had admitted on separate occasions to each of them that he had committed the murder. With this additional evidence, the state attorney obtained a grand jury indictment on March 24, 1982. The trial jury returned verdicts of guilt for the burglary and first-degree murder and recommended the death sentence, which the trial court imposed.

Appellant first argues that the

180-day speedy trial period of Florida Rule of Criminal Procedure 3.191(a)(1) expired on February 9, 1982, as to the murder because of his August 13, 1981, arrest. He claims that the subsequent waiver of speedy trial, following the grand jury's refusal to indict, applied only to the burglary charge and that his murder conviction must be reversed and the cause remanded with instructions to discharge him. We disagree. "A defense continuance constitutes a specific waiver of the speedy trial rule (or, more properly, an estoppel precluding reliance on the rule) as to all charges which emanate from a single criminal episode." Gallego v. Purdy, 415 So.2d 166, 167 (Fla. 4th DCA 1982) (citing

State v. DeSimons, 386 So.2d 283 (Fla. 4th DCA 1980); State v. Corlew, 382 So.2d 787 (Fla. 2d DCA 1980)).

We find merit in appellant's second argument, however, that the trial court erred in refusing to suppress the statements appellant gave subsequent to the time the attorney arrived at the police station and requested access to him. Although a defendant's right to have counsel present during custodial interrogation may be waived, the waiver must be knowingly and intelligently made. Miranda v. Arizona, 384 U.S. 436 (1966).

In finding that appellant did not waive his right to counsel, we agree with Chief Justice Bevilacqua of the Rhode Island Supreme Court in State

v. Burbine, 451 A.2d 22, 35 (R.I. 1982) (Bevilacqua, C.J., dissenting) (emphasis in original):

> [A]lthough a suspect has previously been informed of his abstract right to counsel and has waived that right, he must be informed when his counsel actually seeks to advise him and must knowingly and intelligently reject such opportunity before subsequent statements may be taken and used against him. State v. Haynes, 288 Cr. at 70, 602 P.2d at 273.

Our emphasis is on fairness in apprising a defendant of the recourse available to him. In order for the right to counsel to be meaningful, a defendant must be told when an attorney who has been retained on his behalf is trying to advise him. If the defendant wishes to reject the opportunity for such advice, he may do so. The determination of the

need for counsel is the defendant's prerogative. State v. Craig, 237 So. 2d 737 (Fla. 1970). The police do not have to obey a telephone order of an attorney to cease questioning a defendant, but do have to advise a defendant that an attorney retained on his behalf wishes to speak with him. In Escobedo v. Illinois, 378 U.S. 478 (1964), the Supreme Court quoted with approval from People v. Donovan, 13 N.Y. 2d 148, 243 N.Y.S. 2d 841, 193 N.E. 2d 628 (N.Y. 1963):

> [T]hat court, in an opinion by Judge Fuld, held that a "confession taken from a defendant, during a period of detention [prior to indictment], after his attorney had requested and been denied access to him" could not be used against him in a criminal trial. The court observed that it "would be highly incongruous if our system of justice permitted

> the district attorney, the lawyer representing the State, to extract a confession from the accused while his own lawyer, seeking to speak with him, was kept from him by the police."

Escobedo, 378 U.S. at 486-87 (citations and footnotes omitted). See also Darwin v. Connecticut, 391 U.S. 346 (1968). In Donovan, as in the present case, counsel had been retained on the defendant's behalf by his family. Our holding turns on the fact that the attorney retained by appellant's sister on his behalf was in the station house requesting to speak with appellant. The failure of the police to convey this information to appellant violated his otherwise valid waiver.

The state argues that we should find appellant's waiver valid under

our decision in State v. Craig. We are unpersuaded, however, as the issues before us in Craig were the adequacy of the preinterrogation warnings to inform the defendant of his right to consult with an attorney and have the attorney, with him during interrogation and the manner in which the defendant expressed his desire to waive counsel.

Accordingly, we find the failure to suppress the recorded statement to be reversible error. We therefore reverse the convictions for burglary and first-degree murder and remand for a new trial.

It is so ordered.

BOYD, C.J., ADKINS, OVERTON, ALDERMAN, McDONALD and EHRLICH, JJ., concur

NOT FINAL UNTIL TIME EXPIRES TO FILE REHEARING MOTION AND, IF FILED, DETERMINED.

An Appeal from the Circuit Court in and for Palm Beach Court, Jack J. Cook, Judge - Case Nos. 81-5015 CF and 82-1893 CF

Charles W. Musgrove, West Palm Beach, Florida

for Appellant

Jim Smith, Attorney General and Russell S. Bohn, Marlyn J. Altman and Penny H. Brill, Assistant Attorneys General, West Palm Beach, Florida

for Appellee

SUPREME COURT OF FLORIDA

THURSDAY, OCTOBER 24, 1985

JERRY HALIBURTON,	*	
	*	CASE NO. 64,510
Appellant,	*	
	*	Circuit Court Nos.
v.	*	81-5015CF
	*	82-1893CF
STATE OF FLORIDA,	*	(Palm Beach)
	*	
Appellee.	*	
	*	

* * * * * * * * * * * *

Upon consideration of the Motion for Rehearing and Stay of Disposition of Motion for Rehearing and Withhold of Mandate filed in the above cause by attorney for appellee, and response thereto,

IT IS ORDERED that said Motion be and the same is hereby denied as to the Motion for Rehearing, and it is further

ORDERED that the proceedings in

this Court and in the Circuit Court of the Fifteenth Judicial Circuit, in and for Palm Beach County, Florida, are hereby stayed to and including November 28, 1985, to allow appellee to seek review in the Supreme Court of the United States and obtain any further stay from that court.

A True Copy

TEST:

Sid J. White
Clerk, Supreme Court

By: Tanya Carroll
Deputy Clerk

TC
cc: Hon. John B. Dunkle, Clerk
Hon. Jack H. Cook, Judge
Charles W. Musgrove, Esquire
Penny H. Brill, Esquire

IN THE CIRCUIT COURT OF THE
FIFTEENTH JUDICIAL CIRCUIT OF
FLORIDA, IN AND FOR PALM BEACH
COUNTY.
CRIMINAL DIVISION

Case No. 81-5915 CF
82-1893 CF

State of Florida

vs.

Jerry Haliburton

Defendant.

ORDER

This cause came on before the Court upon defendant's motion to suppress. Upon hearing argument of counsel and being otherwise advised in the premises, it is

ORDERED AND ADJUDGED that the motion to suppress is hereby denied.

DONE AND ORDERED this 8th day of November, A.D., 1982

W. C. Williams III
Circuit Judge

Copies furnished counsel.

Excerpt from the Evidentiary Hearing on Respondent's Motion to Suppress, Testimony of Sergeant Calvin Bryant:

Q. Do you recall whether you said anything to Mr. Haliburton about phone calls?

A. Yes, sir. After entering the office, I told him that a lawyer had called. One of his sisters had called a lawyer for him that was supposed to come to the police station and whenever he got there, he could talk to him, if he wanted to.

Q. Did you say this in the presence of Houser or Mariano, or do you know, at this point?

A. Yes, sir, we were the three of us, sitting there at Sergeant Mariano's desk.

Q. Was it offhandedly, or somber, as the way that you read the rights.

A. Basically the way that I am talking now. I just told him, just told him to make him aware of it.

Q What was the defendant's response to that?

A. Well, he didn't say yes, he wanted to talk to him and

he didn't say no, he didn't want to talk to him. He just sort of slunked his shoulders, like, I will wait until they get here and see.

Q. Then you spoke to Mr. Haliburton again?

A. Yes, sir.

Q. When did that started?

A. Well, again all of the statements made by Mr. Haliburton were recorded on a tape recorder. After going into Mr. Mariano's office, before getting the tape recorder, this time it was out on my desk. I spoke briefly with Mr. Haliburton, to find out, I guess, what it was that he had told Mr. Mariano and whether or not he wanted to tell myself and Sergeant Houser. He didn't express any objections. He was still willing to talk and after ascertaining that he was going to talk to us, I went and got the tape recorder and brought it into the office.

(R. 342-344)

* * *

Q. Now, did you tell Mr. Haliburton that Mr. Burford had called, the first time at 2:30?

A. Yes, sir, I did.

Q. Did you tell him that at 2:30?

A. Not at 2:30, no.

Q. How about the call that Mr. Burford made at 2:45, did you tell Mr. Haliburton about the call at 2:45?

A. No. The only time that I told him was when we went into the Polygraph office at 3:50.

Q. 3:50 -- ten minutes to four?

A. Yes.

Q. About an hour between the time that he called to the time that you called Jerry Haliburton; is that right?

A. Yes, sir.

Q. Now, you didn't put that on tape did you?

A. Nothing that was before I got the tape recorder.

Q. Well, the fact that you are informing him that an attorney was going to be there, that's sort of important; isn't it? As far as the particular confession is concerned?

A. Yes, I'd say that it's important. Yes.

Q. That's what we are here for now, where and under what circumstances Mr. Haliburton was informed of his rights; is that right?

A. Yes, sir.

Q. It was important that particular piece of information be recorded somehow; isn't that right, the information?

A. The way that things happened, he --

Q. Please answer the question. Is that right or not?

* * *

A. Yes, sir, I suppose so.

Q. You didn't do that?

A. No, sir.

Q. Do you remember taking your deposition on January 13th of this year?

A. Yes, sir.

Q. I believe that the Court Reporter was present and Mr. Barkin was present?

A. Yes, sir.

Q. And another attorney by the name of Mitchell Beers was present?

A. Yes, sir.

Q. And Mr. Beers asking you questions as far as what happened in the case, so on and so forth?

A. Yes.

Q. He asked a lot of questions about what happened during the taking of this particular tape, the confession; didn't he?

A. Yes, sir.

Q. I refer Counsel to page 48 of the deposition, line 8. I am going to read you some thing here from what Mr. Beers asked you. "Did you inform Mr. Haliburton that an attor-

ney called?" Answer, "I told him and it came out sometime there about." Question, "You didn't tell him that an attorney called you at 2:30, when you started interviewing him again at 3:56; did you?" Answer, "No, I don't believe so, no." Do you recall taking that statement?

A. Yes.

Q. That is not what you are telling us today; is it?

A. No, sir, it's not.

Q. So, there is a substantial difference between what you said then and what you are saying now!

A. I made a mistake during the deposition. I didn't accurately remember whether I told him or didn't. I gave it considerable thought afterwards and I did tell him about the attorney having called.

(R. 348-351).

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

ORIGINAL

SUPREME COURT, U.S.
FILED
JAN 17 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85-1074

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF FLORIDA,

Petitioner,

vs.

JERRY HALIBURTON,

Respondent.

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

AND APPENDIX

CHARLES W. MUSGROVE
Attorney for Respondent

Congress Park, Suite 1-D
2328 South Congress Avenue
West Palm Beach, FL 33406
(305) 968-8799

QUESTIONS PRESENTED FOR REVIEW

Respondent would respectfully reword the points as follows:

I A. WHETHER REFUSAL OF POLICE TO ALLOW AN ATTORNEY TO SEE HIS CLIENT, EVEN AFTER A JUDGE ORDERS THAT HE BE ADMITTED VIOLATES THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION OR THE SIXTH AMENDMENT RIGHT TO COUNSEL AND REQUIRES SUPPRESSION OF THE RESULTING STATEMENT.

B. WHETHER CERTIORARI SHOULD BE DENIED WHERE A NEW TRIAL IS ALSO REQUIRED BECAUSE THE PROSECUTOR MADE AN IMPERMISSIBLE REFERENCE TO APPELLATE REVIEW.

II WHETHER THE SUPREME COURT OF FLORIDA CAN BE SAID TO HAVE REFUSED TO CONSIDER THE STATEMENT GIVEN TO POLICE HARMLESS WHERE THE OTHER PERSONS TESTIFYING AS TO ALLEGED CONFESSIONS WERE SO BIASED AGAINST RESPONDENT THAT THEY ATTEMPTED TO KILL HIM WITH A GUN.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED FOR REVIEW	i
TABLE OF CONTENTS	ii
TABLE OF AUTHORITIES	iii
PREFACE	1
OPINIONS BELOW	1
FEDERAL CONSTITUTIONAL PROVISION INVOLVED	1
STATEMENT OF THE CASE	1-3
REASONS NOT TO GRANT THE WRIT	3
ARGUMENT	3-7
CONCLUSION	7-8

TABLE OF AUTHORITIES

	Page
Burbine v. Moran 753 F.2d 178 (1st Cir. 1985)	3,4,7
Caldwell v. Mississippi 472 US ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)	6
California v. Green 399 US 149 (1970)	6
Commonwealth v. Hilliard 471 Pa. 318, 370 A.2d 322 (1977)	4
Davis v. State 287 So.2d 399 (Fla. 2 DCA 1973)	5
Dunn v. State 696 SW2d 561 (Tex.Cr.App. 1985)	4
Escobedo v. Illinois 378 US 478 (1964)	3,5
Fay v. Noia 372 US 391 (1963)	6
Hance v. Zant 696 F.2d 940 (11th Cir. 1983)	4
Lewis v. State 695 P.2d 528 (Okl. 1984)	4
Lodowski v. State 302 Md. 691, 490 A.2d 1228 (1985)	4
Meeks v. State 339 So.2d 186 (Fla. 1976)	7
Milton v. Wainwright 407 US 371 (1972)	7
Miranda v. Arizona 384 US 436 (1966)	3,4,5,6,7
Pait v. State 112 So.2d 380 (Fla. 1959)	6
People v. Gott 117 Cal.App. 3d 125, 173 Cal.Rptr. 469 (1981)	4
Proffitt v. State 315 So.2d 462 (Fla. 1975)	7
Richardson v. State 246 So.2d 771 (Fla. 1971)	7
State v. Alford 225 So.2d 582 (Fla. 2 DCA 1979)	4
State v. Blanford 306 NW2d 93 (Iowa 1981)	4
State v. Chase 55 Ohio St. 2d 237, 378 NE2d 1064 (1978)	4
State v. Haynes 288 Or. 59, 602 P.2d (1979)	4

TABLE OF AUTHORITIES (Cont.)

	Page
State v. Jones 19 Wash.App. 858, 578 P.2d 71 (1978)	4
State v. Murray 443 So.2d 955 (Fla. 1984)	6
Sullivan v. State 303 So.2d 632 (Fla. 1974)	7
Townsend v. Sain 372 US 293 (1963)	1
Weber v. State 457 A.2d 674 (Del. 1983)	4
Weinstein v. State 269 So.2d 70 (Fla. 1 DCA 1972)	1
Yates v. State 467 So.2d 884 (Miss. 1984)	4

PREFACE

Respondent accepts Petitioner's preface, and will use A for Petitioner's appendix and RA for Respondent's appendix.

OPINIONS BELOW

The Opinion of the Florida Supreme Court in this cause is now reported at 476 So.2d 192.

FEDERAL CONSTITUTIONAL PROVISION INVOLVED

Also at issue in this case is the Sixth Amendment, which provides as follows:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

STATEMENT OF THE CASE

The Petition does not do justice to the facts of this case. For example, Petitioner claims Respondent was informed that an attorney had called and that Respondent made a continuous valid waiver of his presence. It concedes a small credibility problem in its Footnote 3. The officer who said he told Respondent is contradicted not only by his own prior testimony and by the officers he claimed were there when he said it, but also by his failure to record this vital warning (A 18-19).[1/]

[1/] Petitioner says the Florida Supreme Court was obliged to accept its version on this question. However, the appellate court is only required to accept credible evidence, and this was not. Since Petitioner vouched for the witnesses who contradicted this version, they are bound by those witnesses under Weinstein v. State, 269 So.2d 70 at 72 (Fla. 1 DCA 1972). In any event, there was no finding of fact (A 14-15) and the Judge was presented with argument that nothing mattered as long as Respondent never asked for counsel (RA 1-2). There is insufficient basis here to reconstruct any implied findings of fact within the meaning of Townsend v. Sain, 372 US 293 at 314 (1963).

The alleged continuous valid waiver is also suspect. If the officer who claimed to have told Respondent an attorney called is to be believed, then his alleged response must also be accepted, to wit:

> "Well, he didn't say yes he wanted to talk to him and he didn't say no, he didn't want to talk to him. He just sort of slunked his shoulders, like, I will wait until they get here and see." (A 16-17)

Petitioner concedes the attorney hired by Respondent's sister was not allowed to see him. However, it neglects to mention that police also chased him from the station (RA 3-11) and forced him to have a Judge call twice to order he be let in (A 3). At least 20 minutes passed from the Judge's first unsuccessful call at 4:18 until he finally got in at 4:40 (RA 12). As the footnote (A 3) to the Supreme Court's opinion notes, the same department later refused entirely to honor a similar order, and was cited for contempt.

Petitioner also omits that the attorney retained by Respondent's sister had an ongoing relationship with the family in the sense that the same sister often hired him to represent family members. He was not sure whether Respondent had been one of them in the past (RA 13-14).

The evidence on which the State claims harmless error is the alleged confessions to Respondent's brother and the brother's girlfriend. Both waited many months to come forward, and did so only after they became enraged over an incident involving the girlfriend. The brother was so mad he tried to kill Respondent with a gun (RA 15-16). The overwhelming animosity and bias of these witnesses makes their credibility so suspect that no Court could say the improper reception of other evidence is harmless.

During closing argument to the jury, the prosecutor dwells at length on the contradictions in the various statements which Respondent made (RA 17-24).

Many other errors were complained of on appeal but were not addressed by the Florida Supreme Court because it was ordering a new trial on other grounds. One of the clearer errors is

this. During voir dire, the prosecutor had this discussion with a prospective juror:

> "MR. BARKIN: Do you understand, Mrs. Devries (sic), that even if you sat on the jury and you recommended that, it's still up to the Judge to make a final decision as to sentence?
>
> MS. TOMIES: Yes.
>
> MR. BARKIN: Your recommendation is advisory only?
>
> MS. TOBIES: Yes.
>
> MR. BARKIN: And even if the appellate-- you understand that the sentence is reviewed by the Court of Appeals--" (RA 25)

Respondent immediately objected and moved to strike the venire and start anew. The Judge refused to strike the panel or even to give a curative instruction. (RA 25-27).

REASONS NOT TO GRANT THE WRIT

Both legally and factually, this case is not like either Miranda v. Arizona, 384 US 436 (1966) or Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985). It is more like Escobedo v. Illinois, 378 US 478 (1964). This Court will have ample opportunity to address further ramifications of Miranda elsewhere, so should not grant review in this case. It simply refuses to condone police conduct which holds a defendant incommunicado from 6:30 a.m. on, chases his attorney away from the jail, and will not even let him in when ordered by a Judge, and all without a clear refusal to talk to counsel if available. Such conduct may implicate Fifth Amendment rights, but it also violates the Sixth Amendment. There is no great confusion of decisions on that conduct--it is uniformly condemned.

ARGUMENT

I A. WHETHER REFUSAL OF POLICE TO ALLOW AN ATTORNEY TO SEE HIS CLIENT, EVEN AFTER A JUDGE ORDERS THAT HE BE ADMITTED VIOLATES THE FIFTH AMENDMENT PRIVILEGE AGAINST SELF-INCRIMINATION OR THE SIXTH AMENDMENT RIGHT TO COUNSEL AND REQUIRES SUPPRESSION OF THE RESULTING STATEMENT.

B. WHETHER CERTIORARI SHOULD BE DENIED WHERE A NEW TRIAL IS ALSO REQUIRED BECAUSE THE PROSECUTOR MADE AN IMPERMISSIBLE REFERENCE TO APPELLATE REVIEW.

This case does not involve the same issue as in Burbine v. Moran, supra, where the issue was what effect failure to tell Burbine a lawyer called on his behalf had on validity of his rights waiver. Though there is a question as to whether Respondent was told of counsel's call, it plays no direct role in the Florida decision. It is not even a question of whether to adopt cases which refuse to require police to honor an attorney's demand to speak to a suspect on the phone, such as Wheeler v. State, 705 P.2d 861 (Wyo. 1985), where Wheeler's companions hired a lawyer after he was arrested for drunk driving, and State v. Blanford, 306 NW2d 93 at 96 (Iowa 1981), where the lawyer who was handling Blanford's divorce called after he was arrested for domestic violence. There are others which do require that police give an attorney telephone access. Respondent prefers the latter view, because the former view encourages police to hold suspects incommunicado, and does nothing to dissipate the inherent coercion this Court described in Miranda (384 US at 465-466). But this Court need not answer that question here. No case cited has condoned refusal to let a retained[2/] lawyer in when he is right outside, not even Dunn v. State, 696 SW2d 561 at 569 (Tex.Cr.App. 1985).[3/]

[2/] Though the State refers disparagingly to "unrequested" counsel, it does not argue that counsel was not retained counsel. In almost every case, a relative hires the lawyer whose exclusion from the station or jail requires suppression, e.g. (a) one or both parents in Weber v. State, 457 A.2d 674 (Del. 1983); State v. Jones, 19 Wash.App. 858, 578 P.2d 71 (1978); Lewis v. State, 695 P.2d 528 (Okl. 1984); Yates v. State, 467 So.2d 884 (Miss. 1984); Lodowski v. State, 302 Md. 691, 490 A.2d 1228 (1985); (b) wife in State v. Haynes, 288 Or. 59, 602 P.2d 272 (1979); Commonwealth v. Hilliard, 471 Pa. 318, 370 A.2d 322 (1977); and (c) sister in State v. Alford, 225 So.2d 582 (Fla. 2 DCA 1979); and Burbine v. Moran, supra. Who else could do so? The accused who is incommunicado surely cannot.

[3/] Cited cases which superficially seem to reach a contrary result are distinguishable because they involve attorneys who were not retained by anyone, such as People v. Gott, 117 Cal.App. 3d 125, 173 Cal.Rptr. 469 (1981), where a public defender had neither been appointed nor requested; Hance v. Zant, 696 F.2d 940 (11th Cir. 1983), where counsel who sought the accused had not been retained by anyone and was never denied access; and State v. Chase, 55 Ohio St.2d 237, 378 NE2d 1064 (1978), where counsel did not even claim to represent the accused.

Respondent submits that there can be no valid waiver of counsel if the suspect is kept in the dark about the fact that he has counsel or that counsel is immediately available on the telephone or in person. Absent such knowledge, there cannot be a knowing and intelligent waiver. This very case illustrates the point. Respondent was foolishly continuing to incriminate himself in hopes he could not be charged with murder. If Officer Bryant is to be believed, his response to news of his attorney was not that he did not want to speak to counsel, only that he did not want to wait. He would see when the attorney arrived. How could police continue to rely on that earlier waiver after counsel arrived? Here at least, they had to tell him counsel arrived or suffer the sanction of the exclusionary rule. However, whatever this Court concludes about waiver, the exclusion of counsel also violates the Sixth Amendment.

This case has always been more like Escobedo v. Illinois, supra, where police also kept counsel out improperly. The most applicable part of Miranda is Footnote 35, which reads:

> The police also prevented the attorney from consulting with his client. Independent of any other constitutional proscription, this action constitutes a violation of the Sixth Amendment right to the assistance of counsel and excludes any statement obtained in its wake. See People v. Donovan, 13 NY2d 148, 193 NE2d 628, 243 NYS2d 841 (1963) (Fuld, J.). (384 US at 465)

The State says the right to counsel does not attach until after formal proceedings. While some proceedings, such as lineups, may be conducted without counsel, there is clearly a right to counsel which attends interrogation before charges are filed. Escobedo, supra, was a preindictment interrogation. Any time counsel wants to see his client, the client must be made available unless he refuses. As was noted in Escobedo, supra, and Davis v. State, 287 So.2d 399 (Fla. 2 DCA 1973), denial of counsel at interrogation may render all subsequent proceedings meaningless and hollow.

For both the Fifth and Sixth Amendment violations, this Court should agree the evidence here is properly suppressed. But,

if it disagrees, it should approve the order granting a new trial because of the other clear error in the prosecutor's comment during voir dire.[4/]

It is wrong to tell the jurors that their decision will be reviewed on appeal because it denigrates their function. State law condemns it as fundamental error in Pait v. State, 112 So.2d 380 (Fla. 1959), saying in part:

> ". . . the jury is being told that in some measure they could disregard their own responsibility in the matter and leave it up to the Supreme Court." (112 So.2d at 384)

This Court condemned a similar comment in the sentencing phase of a capital case in Caldwell v. Mississippi, 472 US ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

In the case at bar, the entire jury venire was contaminated by the prosecutor's statement. This Court has its chance to address the Miranda issue elsewhere, so it is pointless to even consider reviewing the new trial order of the Florida Supreme Court here without considering this alternate ground on which a new trial is also required as a matter of State law under Pait v. State, supra. If the new trial order is right for any reason, certiorari should be denied.[5/]

II WHETHER THE SUPREME COURT OF FLORIDA CAN BE SAID TO HAVE REFUSED TO CONSIDER THE STATEMENT GIVEN TO POLICE HARMLESS WHERE THE OTHER PERSONS TESTIFYING AS TO ALLEGED CONFESSIONS WERE SO BIASED AGAINST RESPONDENT THAT THEY ATTEMPTED TO KILL HIM WITH A GUN.

The State accuses the Florida Supreme Court of refusing to consider the harmless error doctrine in this case. The charge seems frivolous in view of that Court's ruling in State v. Murray, 443 So.2d 955 at 956 (Fla. 1984). For just a few examples of the

---

[4/]Were the error not so blatant, Respondent would simply note that any reversal would have to give the Florida Supreme Court a chance to consider these other issues, as in California v. Green, 399 US 149 at 169-170 (1970).

[5/]That is why this Court refuses to issue writs of certiorari to review State decisions which rest on adequate independent State grounds. See e.g. Fay v. Noia, 372 US 391 at 428 (1963).

Court applying the doctrine to capital cases, please see Sullivan v. State, 303 So.2d 632 (Fla. 1974); Proffitt v. State, 315 So.2d 462 at 464 (Fla. 1975); Meeks v. State, 339 So.2d 186 at 190 (Fla. 1976). In Richardson v. State, 246 So.2d 771 at 774 (Fla. 1971), the Court suggested that the harmless error statute stands in para materia with all other statutes and rules.

There are two other flaws to the State's theory. First of all, the evidence was not harmless in its possible effect on the jury. This is partially because the evidence given by Respondent's brother and his girlfriend is not credible enough to assure that any other evidence is harmless. When they waited so long, and then came forward only after they got so mad that the brother tried to kill Respondent with a gun, they demonstrated the depth of their bias and animosity.

It is also because the prosecutor made such extensive use of the statement in closing argument. His recurring theme was that Respondent lied to police. In these circumstances, the evidence is not harmless.

Thus, it seems clear that the Florida Supreme Court did not refuse to consider the harmless error doctrine. It simply found it inapplicable. But, were it otherwise, it is very hard to see how the Court's determination that the error was not harmless raises a Federal question or gives this Court jurisdiction, and that is the second flaw. In Milton v. Wainwright, 407 US 371 (1972), this Court found an alleged constitutional error harmless. This Court may not condone a constitutional error without making its own independent determination that the error is harmless. However, that does not make a Federal question out of a State determination that the error is not harmless. There is no reason for this Court to review that determination.

CONCLUSION

There is no good reason for this Court to accept this case. It is not the same as Burbine, supra, or Miranda, supra. It

involves a police department so intransigent it will not even honor a Judge's order to let an attorney in to see his client. Such conduct is condoned only in a police state. It implicates the Sixth Amendment right to counsel as well as Fifth Amendment rights. Failure to tell Respondent his counsel was there is especially inappropriate in view of the temporal nature of Respondent's earlier waivers. In any event, there are other matters in this cause which require a new trial.

Respectfully submitted,

Charles W. Musgrove

CHARLES W. MUSGROVE
Attorney for Respondent

Congress Park, Suite 1-D
2328 South Congress Avenue
West Palm Beach, FL 33406
(305) 968-8799

APPENDIX

INDEX TO APPENDIX

		Page
1.	Excerpts from Evidentiary Hearing on Respondent's Motion to Suppress:	
	a. Argument of State Attorney	RA 1-2
	b. Testimony of Attorney Refused Admittance by Police	RA 3-11
	c. Testimony of Police Officer	RA 12
	d. Testimony of Attorney Refused Admittance	RA 13-14
2.	Excerpts from Trial Testimony of Respondent's Brother	RA 15-16
3.	Excerpts from Closing Argument	RA 17-24
4.	Excerpts from Voir Dire	RA 25-27

Now, why couldn't Mr. Burford have expressed his Client's right to remain silent before he saw them. WyWhy wasn't it effective while he was out in the hall and Mr. Haliburton was in the interrogation and furthermore, why shouldn't Mr. Haliburton be told that the man was out in the hall. For the very reasons that I just mentioned. Number one, as a technical matter, I must agree that Mr. Burford was retained as this Defendant's lawyer. Now, we got into something when he was testifying, that most of the time when he is retained, he is retained by the Defendant's members of the family, it's rare when I am contacted by the Defendant himself. Technically, as a matter of law, I will argue that the Attorney has to visit the prisoner and ratify the families decision and that's the point that the Attorney-Client privilege attaches. Why shouldn't we have allowed that to happen here? It could have happened here. Ittcould have happened here with Mr. Burford later had no already decided on his own that he wanted to talk to the Police and not already decided on his own that he didn't need an attorney and didn't want to talk to an tattonney at that point. But, what already happened was because he was willing to talk and because he said that he didn't want an attorney, the interrogation had alrady begun and under these circumstances, if it's a proper interrogation, it should continue because the Defendant can stop it at any time. This one never did. Even though we have an identifiable Attorney, who is out in the ahall, the Defendant's waiver in this case, and

in this case is like this remains free and voluntary, if miranda as mandates any meaning at all, again we are telling them athat we are filling the Miranda mandates and if they have been followed-- I am going to wrap it up with a short discussion of the previous cases.

One of them is a case that just came out, that appears to support the Defense. It's a case out of the Second District, Deluka(phonetic) versus State. I will not -- very briefly I will go into this in the memos, I suppose that the Court there said that the State concedes that prior at the jail he was visited by the Attorney. He never informed the booking officer, at the jail that he represented him and did not awant him wquestioned with out the Attorney's presence. What that involved, was that he spoke before the investigation and then exercised that he could do that because he was representing the man and the man had, himself had obviously expressed his wish to have an attorney and was following his advise. I don't think that case supports the Defense at all. There it is, just in this case, they say that it does. State versus Craig, it's an interesting case back in 11970. I want to burden you a little with quotation. This is a case where the Fourth District Reversed the conviction, saying that the Defendant hasdnot freely and voluntarily waived his rights, because at some point in the game he said, well, they said that he was equibocable about the exercise of his rights. The Florida Supreme Court, State versus Craig, 237 Southern Second 738, it's in the 1970 said that the

what, somewhere around 15, 20 minutes, half an hour, maybe, before 3:58, somewhere in that neighborhood.

Q Okay. Again, you can't be exactly sure?

A Can't be sure of the time, no.

Q Okay. But at sometime you did get to the station?

A Yes.

Q Okay. Do you recall approximately the time you got there?

A The only time reference I have is I made notes after I was ejected from the Detective Division in the lobby. I made a note 3:58 that I had been refused permission to see Jerry Haliburton.

My recollection is that I made that note in the lobby of the police department after I had been ejected and it probably would have been within a minute or two minutes after I had left the Detective Division, however long it takes to walk downstairs.

Of course, there was a little frustration on my part as to what action I was going to take so that would have taken a little time.

Q Okay. So at the time you recorded this 3:58 time period, you had already been thrown out of the Detective Bureau?

A Yes.

Q They already told you you were not going to be able to see Jerry Haliburton, is that correct?

A That's correct.

Q Do you recall who it was that told you that?

A The person who ejected me?

Q If there are more than one, whoever.

A I know that -- I'm pretty certain it was Gabbard. I was looking at the officers who were witnesses today, trying to see if I recognize the gentleman that I had seen. I know all of them when I see them but I am not sure of their names. I believe it was Gabbard.

Q Okay. Did you also speak with anybody else besides Lieutenant Gabbard, now Captain Gabbard?

A I believe I spoke to Jamason.

Q Do you recall at any time talking with Captain Griffin?

A I may have. I believe he was there.

Q Okay.

A I am not sure whether I talked to him or not. It wasn't a whole lot of talk going on. Most of the talking was being done by the fellow who ejected me, whom I believe is Gabbard.

Q Okay. Can you characterize this attitude this individual had, this officer? Was he friendly and polite?

A I was extremely surprised by his attitude. I know all of them. I knew him by sight. He was very obnoxious, belligerent. I was taken back because usually I am treated with respect as I treat them with respect.

I know him. I've seen him before. We had been friendly.

All of a sudden he was getting red in the face, "Get out; leave."

I'm saying, "Wait a minute. Wait a minute. What's this all about?"

I eventually said, "Let me talk to Jamie. Let me find out what's going on. I have always treated you with respect."

He said, "The man doesn't want an attorney. Get out, leave," almost physically threw me out of the Detective Division.

Q Had you ever told him or tried to tell him anything about whether, you know, that you had been retained?

A Oh, yes, that was one of the first things I said, "I want to Jerry Haliburton. I have been retained. I want to see him."

Q That didn't phase him, apparently?

A No.

Q What was your reaction upon being ejected from the Detective Division?

A Well, about 15 years of practice at that time, I guess it had been around 14 years of practice, I never had anything like that happen, either being ejected or treated that way by any of the officers in any department.

MR. BARKIN: I object. This feeling about being ejected isn't really relevant.

MR. KLYMAN: I think he can just characterize the whole situation.

THE COURT: Go ahead.

Objection overruled.

THE WITNESS: So I was kind of doubly upset. As an attorney, I was extremely upset that I wasn't permitted to see a client that I had been retained to see and, personally, I was upset because of the treatment I was given, so I, when I was thrown out, I was bound and determined I was going to get in, plus I had the suspicion which had been planted by the sister that maybe he was being mistreated. That would be an explanation of why they were so belligerent, why this unusual activity, why this unusual thing happening, refusing admittance of an attorney.

That was in my mind. That made me very

determined to get in to see Jerry Haliburton.

BY MR. KLYMAN:

Q What steps did you try to take to get in to see Jerry Haliburton?

A I thought what I could do. I said I need judicial ruling, so I called my office, asked my secretary to get the name of the duty judge and the number.

Q Who was that?

A It was Judge Barkett.

My secretary called me back. I gave her the pay phone number. I was using a pay phone there in the lobby.

She called me back, gave me -- told me it was Judge Barkett, gave me the number.

I immediately called Judge Barkett.

Q Do you happen to recall what the nature of the conversation was with Judge Barkett?

A I recall on deposition -- I still don't have it straight as to how many calls were made to Judge Barkett. It could have been the very first call I made to her she patched in Assistant State Attorney Paul Moyle to get the State's side on the issue or it could have been when I first talked to her she said, well, let me get ahold of the State, got the number of the pay phone and called me right back

after she got Moyle patched on.

It would have been a matter of a few minutes, in any event.

Q Okay.

A Then Mr. Moyle and Judge Barkett were on a conference phone with me and I explained the situation and she ruled and advised Mr. Moyle that her ruling was that I would be permitted to see him and she was going to call, I think she said, Chief Jamason and give instructions to let me in.

Q Okay. Did you ever record what time it was you received these instructions from Judge Barkett?

A Yes, I did. That was the other time I noted on my notes, it was 4:18 was when I finished that conversation.

That is the joint conversation with Mr. Moyle, Judge Barkett and myself.

Q Okay.

So, as far as the times that you recorded, I take it the only times you recorded was 3:58 when you were down in the lobby after being ejected from the Detective Division, is that right?

A That's right.

Q And 4:18 is when you concluded your consultation with Judge Barkett and Paul Moyle in

reference to the situation, is that right?

A That's correct. Those two times I could be certain of.

Q Okay. Did you use your watch or did you use the clock in the Detective Division?

A I used my own watch.

Q To the best of you knowledge, was it accurate?

A Yes, it was accurate. I was meeting all my appointments on time.

Q Okay. But as far as the number of conversations you had with Judge Barkett, would it be fair to say there was at least two of them?

A At least two.

Q And possibly three?

A Possibly three.

Q Okay.

A Possibly four.

Q All right. So it was around 4:18 that you heard from Judge Barkett you were going to be let in?

A Right.

Q Upon hearing that, did you try to go back in the Detective Division?

A Yes. Judge Barkett said, "Give me sufficient time to call, give the orders and go on in."

I waited about five minutes or so.

Q Was that down in the lobby?

A In the lobby, giving her time to call and give the instructions and after that period of time, five minutes or so, I went over to the sergeant at the desk and informed him that Judge Barkett had ruled that I was to see Jerry Haliburton and I wanted to go up and see him.

I got on his phone and talked to somebody and he said, "Well, their position is that you cannot see him," words to that effect.

So I said, "Fine."

I went back to the pay phone, called Judge Barkett again and said, "Judge, they will not let me see him. Their position is they're still not going to let me see him."

That's where I am not sure whether there was another call or not.

She said in that conversation that she was going to call them again and give them explicit instructions to let me in and if they did not let me in I was to call her back and she was going to come over personally and see that I was admitted.

Then, shortly after that conversation, I talked to the sergeant at the desk again, told him what she said, that she would be calling again, somewhere in there, and he made another call and he said, "Well,

their position is you're not to see him."

I was walking back toward the pay phone again and then he signaled to me and said there's been a change of decision. You are now able to see him.

That's where the fourth call may have come in, I may have called Judge Barkett to inform her they were complying.

I don't recall whether I did or not.

Q Do you recall what time it was you finally did get in to see Jerry Haliburton?

A I really couldn't say. I can only estimate.

Q Sometime after the 4:18 time that you recorded, is that right?

A Yes.

Q Now, you say you have been an attorney about 15 years, is that right?

A Right along that line.

Q Have you practiced criminal law during that period of time?

A Throughout that period, yes.

Q You say you were taken back as far as the whole way you were treated, so on and so forth. I take it this sort of thing never happened before?

A No, it did not.

MR. BARKIN: I am entering an objection because,

told Sergeant Bryant to come on out and I talked to Bryant and we stopped the questioning.

Q I think you indicated a coffee break and then talked to him --

A I said and it's reflected on the tape, I believe when I called Sergeant Bryant out, I said, how about taking a coffee break and the real reason was to tell Sergeant Bryant what was going on, but we did drink some coffee, too.

Q All right. And then what happened at 4:20?

A At -- I guess -- 4:20 to 4:40, just doing paperwork and talking to Captain Griffin, Lieutenant Gabbard and so forth.

At 4:40, approximately 4:40 p.m., attorney Tom Burford arrived at the Detective Division, or came.

Q That's when you saw him for the first time?

A That's when I saw Mr. Burford the first time.

Q Is that about when Mr. Burford went to talk with Mr. Haliburton?

A Yes, approximately 4:40 to 4:45.

Q And at that point Mr. Haliburton indicated he didn't want to speak further to you?

A Mr. Burford spoke with him until approximately 5:10 p.m. and, yes, 5:10 p.m. and when Mr. Burford came out, he and I went back in and talked to -- I believe

THE COURT: Thank you.

CROSS EXAMINATION

BY MR. BARKIN:

Q Mr. Burford, you state that on August 13th, you had been retained as the attorney to represent Jerry Haliburton, is that correct?

A That's correct.

Q However, you had no conversation with Jerry Haliburton on that day, had you?

A Not prior to being admitted to the Detective Division, no.

Q In other words, Jerry Haliburton never said to you, Mr. Burford, or Tom, or anything of that nature, I would like you to represent me?

A No.

Q The call had come through his sister?

A Yes.

Q And if I understand it as you explained to me before, you have represented members of the Haliburton family on various matters in the past?

A Yes, and usually, it was Helen who initiated the contact and asked me to represent somebody.

Q However, I think you said you -- you said you can't remember representing this particular man, Jerry Haliburton?

RA 13

A I am not sure if I did or not. I may have many years ago. I'm not sure.

Q There was no ongoing attorney-client relationship between you?

A Oh, no. I work on individual case basis. If I had represented him, it would have concluded with whatever case I had represented him on.

Q And similarly, there was no pending case, whether criminal or civil, involving Mr. Haliburton at the time that you were representing him on?

A No.

Q I want to talk a little bit about your phone calls. You mentioned there might have been a first phone call that you called to the station, is that correct?

A There definitely was a first phone call in the morning. I called the Detective Division to find out if Jerry Haliburton were, in fact, there and also there was a question of whether he had been booked and charged and I asked about that, too, because that's what Helen, his sister, had said, they had held him there since 6:00 o'clock. He hadn't been charged with anything, hadn't been booked on any charges and I confirmed that, that he had not been booked or charge with anything at the time I called in the morning, that he was there and had not been booked and charged.

BY MR. BARKIN:

Q Have you been promised that you would never be prosecuted?

A No.

MR. BARKIN: I have no further questions at this time.

THE COURT: Cross, Mr. Bailey?

CROSS-EXAMINATION

BY MR. BAILEY:

Q Do you hate Jerry?

A Excuse me?

Q Do you hate Jerry?

A No.

Q Do you love him?

A No.

Q You shot him?

A Well, I shot at him. I didn't learn until after he was shot --

Q Hum?

A Until my brother approached me the next day or a couple days later.

Q You shot at him and the bullet struck him and put him in the hospital, is that correct?

A I didn't know if it struck him or not at that time.

FORM FL-19 REPORTERS PAPER & MFG. CO 800-826-6313

Q You shot with intent to kill, correct?
A Yes.
Q And you testified to kill, correct?
A Excuse me?
MR. BARKIN: Objection. That's testimony by defense counsel.
THE COURT: Sustained.
BY MR. BAILEY:
Q When was it you went to anybody and told them about these conversations you supposedly had with Jerry?
A About the murder and all?
Q Um-hum.
A It was on a Tuesday.
Q What month, what year?
A It was in March.
Q March?
A '82.
Q '82?
A Right.
Q Okay. The first conversation you say occurred in December of '81, is that correct?
A Between Jerry and I?
Q Yes.
A Yes.
Q And the next conversation occurred about a month

FORM PL-19 REPORTERS PAPER & SUPP. CO. 800-328-6313

All right. Well, you all know what happened from there. The crime scene led to a fingerprint of Jerry Haliburton. They take Jerry to the station. Where is his fingerprint found? Three full fingerprints are found on a jalousie, one of the jalousies that had been removed.

Now, imagine, now, the feelings of the Defendant in this case? He's been brought down to the station. He knows he's being questioned for a murder. He knows they came to his house with a warrant. He knows there's some evidence there, that it's making them suspect him,but at this point he does not know what it is, so what does he do? He stonewalls.

First of all, he starts out by saying he knows something links him to Donald Bohanan but he's not sure what. I was smoking there in the alley with him. Then he realizes he's been in there through that house.

There's got to be more to it, so he's got to change his story a little bit, so what does he say? He changes it then. He said, now, he was upstairs smoking with Bohanan.

Now, Mr. Bailey told you, he raised the inference, he told you who would get close enough, who

would be on the bed with Donald Bohanan? Well, if you heard the statement of Jerry Leon Haliburton, as he is beginning to stonewall, he tells you I was sitting on Don's bed.

MR. BAILEY: Judge, may we approach the bench for purposes of argument?

THE COURT: Yes.

(Whereupon, the following proceedings were had in the presence, out of the hearing of the jury.)

MR. BAILEY: Judge, I'm going to move for a mistrial on the prosecutor saying "stonewalling." That's referring to silence.

MR. BARKIN: It's referring to the statement he gave to the police.

MR. BAILEY: No, stonewalling is being silent and I think it highlights it at trial, his righttto remain silent at trial, also.

THE COURT: I am going to deny the motion for mistrial.

Mr. Barkin, however, I will instruct you not to refer to Mr. Haliburton's lack of competence in any manner.

MR. BARKIN: His what?

THE COURT: His lack of comments.

MR. BARKIN: What I meant by stonewalling, he

was telling a story that was not true. I will make that more clear to the jury.

THE COURT: You should put it that way rather than stonewalling.

Do you wish me to instruct the jury to disregard it?

MR. BAILEY: No. My position to instructing them is to highlight the error in their mind.

MR. BARKIN: I will say to the jury by stonewalling I mean telling a story not true.

MR. BAILEY: I would object to any further use of the word.

THE COURT: Well, you may without saying that, if that's Mr. Bailey's objection, do not employ that particular term.

MR. BARKIN: Okay.

(Whereupon, the following proceedings were had in the presence and hearing of the jury.)

MR. BARKIN: Jerry Haliburton is being evasive. Now, what does he say? He says he was on the bed smoking marijuana. Now, why is Jerry Leon Haliburton, himself, on the bed with Donald Bohanan? The answer is obvious, because he was over him at one time, he was over him on the bed. If the cops have any evidence to link him to that bed, he has to have an

explanation for it, and that's what he says, despite the testimony of all the other witnesses that he did not socialize with Donald Bohanan, that's his reason for saying he was there on Donald Bohanan's bed.

He says over and over and over and over again in the most serious, most sincere voice he can, lasting over a period of an hour and a half, two hours, no, I did not break into Donald Bohanan's apartment that night. No, I did not break into Donald Bohanan's apartment that night. I wouldn't have. I was wearing such nice clothes, my clothes were too good to break in that night. I was dressed well. I think he even said "dressed to kill," so why is he saying that now?

Because he does not want to get pinned with a crime but he wants to explain any evidence that might be found linking him to Bohanan's apartment and to Mr. Bohanan's bed, and we know the reason for it.

As he talks more, we see more of the reason. He acknowledges to the police, he says, yes, I'm a burglar. He figures the police know him, know who he is, but I didn't burglarize that night, and he tells you the reason why he's saying that

because at one point, and I think I wrote it down here, Defendant says what's burglary carry?

Sergeant at that time, Sergeant Houser, I don't know, five years.

Defendant Jerry Leon Haliburton, what's murder carry?

Life, the electric chair? Hey, I'm just a burglary, but his story was not washing. His story was not washing.

No one was buying it and you heard at one point Lieutenant Houser told him we got some fingerprints and then he figured his story is not jiving together because his story that he was just up there smoking marijuana in Donald Bohanan's bedroom does not correspond to his fingerprints being found on the jalousies.

So what is it now? It's time to but his losses.

After all, what does burglary carry, five years, ten years? What does murder carry? So that's when he tells you his story, he admits to doing the burglary. At that point he is cutting his losses.

Now, let's talk about the crime here involved. This was no mere -- he knows what he's facing and this is why he's telling the story, this

is why he's willing to concede the burglary. This is no mere crime of passion resulting from a bar fight, resulting from people who have a disturbance over the silly things that people get wound up in. This is a cold-blooded mutilation, and he has got to do everything to avoid being tagged with it.

So he shifts to these new grounds. He will -- he tells you one jalousies was already removed. The screen was bent. I removed some others, went in, but in shifting to this new ground, not only does he have to admit that he repeatedly said something that was not true to the police over and over, but other contradictions are now revealed in his statement because of the position he now must take.

He talks about his philosophy of burglaries. He says he never breaks into a house where people are at home but at the same time by his own story, he was there smoking marijuana with Donald Bohanan at 12:30 p.m. He left. Donald Bohanan was going to bed. He knew Donald Bohanan was home. It's logical, in any event, to believe that at 3:30 in the morning somebody is going to be home. Jerry Haliburton says of all the burglaries he did, there's never been anyone in the house. He's getting

nervous, now. They ask him what were you going to steal when you broke in? He said everything, the stereo, the TV, everything I could find.

Now, he's just revealed another contradiction because earlier in the taped statement he said he never takes stereos, he never takes TVs because they're too easy to trace. That's the first reference we have of the language he uses, too easy to trace.

Earlier he wouldn't have stolen those things. It was too easy to trace, but there at 3:30 in the morning, a neighbor who would be bound to recognize him, he would go in and while he's sleeping loot his entire living room, but he wouldn't get caught.

He said at the time he admitted to it, actually doing the burglary, he doesn't mess with knives. If there was a gun, though, he might take that. I like guns.

You recall earlier in his statement, he said he didn't mess with knives and guns at all. He's starting to slip a little. The facade is showing. The story he has concocted is starting to fall apart.

He talked about going to the party, alcohol, the marijuana he smoked and his quote was I

was fucked up that night. Then he realizes, well, that could get him in trouble, well, not so fucked up to go commit a murder.

He said that he dealt with Donald Bohanan by smoking with him, that most of the way he deals with people is to get high, so we know by his own statement that he was affected by other substances that night.

Basically, ladies and gentlemen, there's only --the evidence points to only one person as having been in that apartment, it points to nobody else and that it points to Jerry Leon Haliburton.

Now, the defense wants you to believe that Terry Cast did the murder. It's kind of an interesting contradiction they raise when they say that.

First they say you heard Dr. Hobin, he said this is a crime of rage, a crime of frenzy. The knife, a pocketknife, is a weapon of opportunity. Basically, like it was something that happened at the spur of the moment.

Yet, at the same time, to justify the tale he's telling you, he says, however, we know that screaming, clever Terry Cast, knowing that Jerry Leon Haliburton is the neighbor burglar, is

MR. BARKIN: You could envision a set of facts or circumstances under which you could recommend a sentence of death?

MS. TOBIES: Yes.

MR. BARKIN: Do you understand, Mrs. Devries (sic), that even if you sat on the jury and you recommended that, it's still up to the Judge to make a final decision as to sentence?

MS. TOBIES: Yes.

MR. BARKIN: Your recommendation is advisory only?

MS. TOBIES: Yes.

MR. BARKIN: And even if the appellate -- you understand that the sentence is reviewed by the Court of Appeals --

MR. BAILEY: Judge, I object.

THE COURT: Mr. Barkin, please avoid making statements of the law.

MR. BAILEY: Can I approach the bench?

THE COURT: Yes.

(Whereupon, the following proceedings were had in the presence, but out of the hearing of the jury venire.)

MR. BAILEY: Technically, a Motion for Mistrial is not appropriate because the jury hasn't been sworn, but I would make a motion in the nature of a

motion of a mistrial, ask it be excused, prosecutor misconduct by improper conduct in voir dire. He just went through, of course, it's not really your decision. The Judge makes it. Then after that it gets reviewed by a higher court.

That is a passing-the-buck type argument that perverts the law, perverts the jury's bearing of that responsibility and is improper. I move for a dismissal of this jury panel as a result of those comments, particularly the reference to the appellate process which does not review the sentence.

Well, I guess it does.

THE COURT: It does review the sentence. I'm going to deny the motion. I don't think it was a misstatement of the law, as such, but, frankly, it doesn't matter whether they understand that or not. The question is what's -- the question that's been asked.

Again, if you will zero in on that, Mr. Barkin, and keep it there.

MR. DAILEY: As an alternative, I would ask for a corrective jury instruction. I still maintain my prior motion but I do that as an alternative, as I believe I am required to by the rules.

THE COURT: In what manner corrective?

RA 26

MR. BOHN: Can I recommend one?

MR. BAILEY: You can recommend one. I don't think it can be corrected. That's what I maintained in my original motion about the comment about --

MR. BOHN: I was just going to recommend the Judge instruct that that again their role is render an advisory verdict and that the decision is with the Judge.

THE COURT: Well, I think that's what he's told them. I don't think that any misstatement has been made, but -- to poison the panel, but just stick to the questions, Mr. Barkin, all right?

(Whereupon, the following proceedings were had in the presence and hearing of the jury venire.)

MR. BARKIN: Mr. Heeland, do you have any moral, religious or ethical opposition to the death penalty?

MR. HEELAN: No.

MR. BARKIN: You could follow the law?

MR. HEELAN: Yes.

MR. BARKIN: Mr. Block?

MR. BLOCK: No.

MR. BARKIN: You could follow the law?

MR. BLOCK: Yes.

MR. BARKIN Miss Jasmond

RA 27

Supreme Court, U.S.
FILED
JAN 30 1986
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 85-1074

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

STATE OF FLORIDA,

Petitioner,

vs.

JERRY HALIBURTON,

ON WRIT OF CERTIORARI TO
THE SUPREME COURT OF FLORIDA

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

JIM SMITH
Attorney General

PENNY H. BRILL
Assistant Attorney General
111 Georgia Avenue, Room 204
West Palm Beach, FL 33401
(305) 837-5062

Counsel for Petitioner

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
ARGUMENT	1
CONCLUSION	8

TABLE OF AUTHORITIES

	Page
Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985)	7
Carter v. Kentucky, 450 U.S. 288 (1981)	6
Brewer v. Williams, 430 U.S. 387, 398 (1977)	4
Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985) cert. granted Moran v. Burbine, ___ U.S. ___, 105 S.Ct. 2319, 85 L.Ed.2d 838 (1985)	1,2
Escobedo v. Illinois, 378 U.S. 478 (1964)	4
Exxon Corporation v. Eagerton, 462 U.S. 176, (1983)	6
Illinois v. Gates, 462 U.S. 213 (1983)	5-6
Milton v. Wainwright, 407 U.S. 371 (1972)	8
Miranda v. Arizona, 384 U.S. 436 (1966)	1,3,4
Sandstrom v. Montana, 442 U.S. 510 (1979)	6

TABLE OF AUTHORITIES (CONT.)

	Page
State v. Burbine, 451 A.2d 22, 35 (R.I. 1982)	2
State Farm Mutual Automobile Insurance Company v. Duel, 324 U.S. 154 (1945)	6
United States v. Gouveia, ___ U.S. ___, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984)	4
UNITED STATES CONSTITUTION	
Fifth Amendment to the United States Constitution	3
Sixth Amendment to the United States Constitution	3,4,5
STATUTES	
Florida Statutes (1981) Section 921.141	7

ARGUMENT

In his Brief in Opposition, Respondent argues that certiorari should not be granted for three reasons: the instant case is not legally or factually like either Miranda v. Arizona, 384 U.S. 436 (1966) or Burbine v. Moran, 753 F.2d 178 (1st Cir. 1985) cert. granted Moran v. Burbine, ___ U.S. ___, 105 S.Ct. 2319, 85 L.Ed.2d 838 (1985); that a new trial is also required in the instant case because the prosecutor made an impermissible reference to appellate review; and that the Florida Supreme Court properly considered and rejected the doctrine of harmless error in the instant case. Petitioner's submits that none of Petitioner's arguments detracts from the reasons presented in the petition for granting the

writ of certiorari, for none has merit.

Respondent attempts to persuade this Court that the present petition does not involve the same issue as in Burbine v. Moran, supra. Respondent seems to overlook the fact that the Supreme Court of Florida specifically relied on the dissenting opinion in State v. Burbine, 451 A.2d 22, 35 (R.I. 1982)(Bevilacqua, C.J., dissenting) to hold that the failure of the police to tell the Respondent that the attorney retained by his sister on his behalf was in the station house requesting to speak with him, violated Respondent's otherwise valid waiver of his rights. (A. 9).[1/] As stated in its Petition, there is

---

[1/] Petitioner will again refer to its appendix by the letter "A", and will also refer to Respondent's appendix by the letters "RA."

little question that the Supreme Court of Florida's interpretation of the requirements of Miranda and the Fifth Amendment, as set out in its opinion in the instant case is in conflict with other decisions of state courts of last resort.

Petitioner would further submit that despite Respondent's attempt to show otherwise, the instant case does not involve the Sixth Amendment's right to counsel. The Constitution does not guarantee that a criminal suspect is entitled to the assistance of counsel during all encounters with the police in which investigation of crime is the primary police motive. Rather, the Sixth Amendment guarantees the assistance of counsel only after adversarial proceedings have commenced

against the suspect, whether by way of formal charge, preliminary hearing, indictment, information, or arraignment. Brewer v. Williams, 430 U.S. 387, 398, (1977). In United States v. Gouveia, ___ U.S. ___, 104 S.Ct. 2292, 81 L.Ed.2d 146 (1984), this Court reaffirmed "that the right to counsel attaches only at or after the initiation of adversary judicial proceedings against the defendant." Id. at ___, 104 S.Ct. at 2297. The instant case is clearly distinguishable from Escobedo v. Illinois, 378 U.S. 478 (1964) in which the defendant invoked his Miranda rights, by requesting counsel. Respondent in the present case never requested to speak with counsel. Thus, there is clearly no Sixth Amendment violation present in

the instant petition.[2/]

Respondent further argues that this Court should refuse to grant the petition because this Court should approve the order granting a new trial because of an alleged error in the prosecutor's comment during voir dire concerning their function in the sentencing process. Petitioner submits that Respondent's position is unsupported.

First, it must noted that the Supreme Court of Florida never addressed this issue. It is well established that when the state court has not passed on the question, this Court may not do so. See Illinois v. Gates,

---

[2/] It should also be noted that the Supreme Court of Florida did not address the issue in Sixth Amendment terms.

462 U.S. 213, 218-223 (1983); Exxon Corporation v. Eagerton, 462 U.S. 176, 181 n. 3 (1983); Carter v. Kentucky 450 U.S. 288, 304 (1981); Sandstrom v. Montana, 442 U.S. 510, 527 (1979); State Farm Mutual Automobile Insurance Company v. Duel, 324 U.S 154, 160 (1945).[3/] Secondly, this Court should review the issue of the admissibility of the statement because if there is a retrial ordered for any other reason, the State must know whether it can properly introduce those statements as evidence in its case in chief. Thus, any issue as to the prosecutor's comment in the present case, presents no reason for

---

[3/] Thus, this Court cannot even consider if the decision would rest on independent state grounds concerning the prosecutor's comment.

this Court to deny review.[4/]

As to Respondent's third argument in opposition to review, Petitioner would reassert its position that the Supreme Court of Florida failed to not only consider, but to properly apply, the harmless beyond a reasonable doubt standard on the introduction of Respondent's tape recorded statements

---

[4/] Respondent's argument is also without merit. The prosecutor in the present case simply informed the prospective jurors what the sentencing process in capital cases entailed in Florida, including that the trial judge was the ultimate sentencer, and that the appellate court reviewed the sentence. (RA. 25). This was a correct statement of the law. Section 921.141, Florida Statutes (1981). This Court's decision in Caldwell v. Mississippi, 472 U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985) is inapplicable because in Mississippi, unlike Florida, the jury was the ultimate sentencer, subject only to appellate review.

to the facts in the present case. Such failure conflicts with this Court's opinion in Milton v. Wainwright, 407 U.S. 371 (1972).

CONCLUSION

Clearly, Respondent has not advanced any meritorious reason for this Court to deny the petition for writ of certiorari. Thus, because there is a solid jurisdiction basis upon which to grant review as well as the presence of substantial questions of federal law, Petitioner submits that the instant Petition for Writ of Certiorari should be granted.

Respectfully submitted,

JIM SMITH
Attorney General

PENNY H. BRILL
Assistant Attorney General
111 Georgia Avenue, Suite 204
West Palm Beach, Florida 33401
Telephone: (305) 837-5062

Counsel for Petitioner